

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

LISA MORRIS, MICHAEL BUI, and  
TUMIKA WILLIAMS on behalf of  
themselves and all others similarly situated,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

CASE NO. 3:18-cv-157-RJC-DSC

**MEMORANDUM IN SUPPORT OF DEFENDANT BANK OF AMERICA, N.A.'S  
MOTION FOR LEAVE TO FILE A RESPONSE TO PLAINTIFFS' SUR REPLY**

Bank of America, N.A. ("BANA") seeks to file a short response to arguments made by Plaintiffs' for the first time in their Sur Reply, filed as Doc. No. 34, (hereinafter, "Sur Reply"). BANA's Memorandum in support of its Motion to Dismiss Plaintiffs' Second Amended Complaint, filed as Doc No. 23, (hereinafter, "MTD") explained that the laws of Oklahoma, California, and Georgia governed Plaintiffs' claims. (MTD at 6). In Plaintiffs' Memorandum in Opposition to BANA's Motion to Dismiss, filed as Doc. No. 26 (hereinafter, "Opp."), Plaintiffs' asserted that North Carolina law applied to their common law claims, but that the laws of Oklahoma, California, and Georgia were pled in the alternative. (Opp. at 8 n.5). BANA responded to Plaintiffs' incorrect choice of law analysis in its Reply (Doc. No. 29) and further explained why North Carolina law did not apply to the issues in dispute.

Subsequently, Plaintiffs' received leave of court to file a Sur Reply to address BANA's choice of law analysis. Instead of properly using the Sur Reply to address the actual arguments made by BANA in its Reply, *Plaintiffs' argued for the first time* that choice of law determinations

should not be made at the motion to dismiss stage. (Reply at 1-2). BANA has not had an opportunity to respond to this argument and respectfully moves this Court for leave to distinguish the authority cited by Plaintiffs' and to provide the Court with governing authority that contradicts Plaintiffs' position. *See e.g. United Dominion Indus, Inc. v. Overhead Door Corp.*, 762 F. Supp. 126 (W.D.N.C. 1991) (emphasis added) (***While considering defendant's motion to dismiss***, the court conducted a North Carolina choice of law analysis and used the *lex loci* test to find that Texas law, and not North Carolina law, applied to any claim asserted by plaintiff on the basis of unfair and deceptive conduct. Based on this finding, the court dismissed plaintiff's claim under N.C.G.S. § 75-1.1.)

BANA also moves this Court for leave to address a misrepresentation made by Plaintiffs', ***for the first time***, in their Sur Reply. Plaintiffs' incorrectly state that "BANA has failed to demonstrate [] an actual conflicts exists with respect to Plaintiffs' contract and common law claims under North Carolina law, California law, Oklahoma law, and Georgia law."<sup>1</sup> (Reply at 3 n.1). Based on this misrepresentation of BANA's argument, Plaintiffs' contend that "[i]n the absence of an actual conflict, this Court is free to apply North Carolina law to Plaintiffs' claims." *Id.* BANA has not had an opportunity to respond to this argument or to distinguish the authority cited in support thereof. However, allowing BANA to respond will assist the Court in its consideration of the pending motions and will not result in any prejudice to Plaintiffs. *See Keith v. Clarke Am. Checks, Inc.*, 261 F. Supp. 2d 419, 420 n.1 (W.D.N.C. 2003) (whereby the court allowed and considered a response to a surreply.

---

<sup>1</sup> This is false. In its MTD and Reply, BANA set forth the various elements and case law distinctions concerning Plaintiffs' common law claims under the laws of Oklahoma, California, and Georgia. BANA also explained that Plaintiffs' had failed to plead necessary facts to support any of the common law causes of action. *See generally*, BANA's MTD and Reply.

## **CONCLUSION**

For these reasons, BANA's motion for leave to file a response to Plaintiffs' Sur Reply should be granted. BANA further requests the Court to allow five days from entry of an Order to file its response.

This the 2nd day of November 2018.

### **McGUIREWOODS LLP**

s/ Brian A. Kahn

Brian A. Kahn  
North Carolina Bar No. 29291  
Jasmine K. Gardner  
North Carolina Bar No. 47853  
201 N. Tryon Street, Suite 3000  
Charlotte, North Carolina 28202  
(704) 343-2000 (Telephone)  
(704) 343-2300 (Facsimile)  
[bkahn@mcguirewoods.com](mailto:bkahn@mcguirewoods.com)  
[jgardner@mcguirewoods.com](mailto:jgardner@mcguirewoods.com)

Cynthia C. Guerin (admitted *pro hac vice*)  
Texas Bar No. 03802100  
2000 McKinney Avenue, Suite 1400  
Dallas, Texas 75201  
(469) 372-3906 (Telephone)  
(214) 273-7485 (Facsimile)  
[cguerin@mcguirewoods.com](mailto:cguerin@mcguirewoods.com)

Carolee A. Hoover (admitted *pro hac vice*)  
California Bar No. 282018  
Two Embarcadero Center, Suite 1300  
San Francisco, CA 94111  
(415) 844-9944 (Telephone)  
(415) 844-9922 (Facsimile)  
[choover@mcguirewoods.com](mailto:choover@mcguirewoods.com)

*Attorneys for Bank of America, N.A.*

### **CERTIFICATE OF SERVICE**

I hereby certify that on November 2, 2018, I electronically filed the foregoing document, with any and all attachments with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

David M. Wilkerson  
dwilkerson@vwlawfirm.com  
Larry McDevitt  
lmcdevitt@vwlawfirm.com  
The Van Winkle Law Firm  
11 North Market Street  
Asheville, NC 28801

James J. Pizzirusso (admitted pro hac vice)  
jpizzirusso@hausfeld.com  
HAUSFELD LLP  
1700 K St., NW, Ste 650  
Washington, DC 20006

Jeffrey Kaliel (admitted pro hac vice)  
jkaliel@kalielllc.com  
Sophia Gold (admitted pro hac vice)  
sgold@kalielllc.com  
Kaliel PLLC  
1875 Connecticut Ave, NW, 10th Floor  
Washington, DC 20009

*Attorneys for Plaintiffs*

s/ Brian A. Kahn  
\_\_\_\_\_  
Brian A. Kahn